SUPREME COURT, U. S.

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No. 74-1381

In the
Supreme Court of the United States
October Term, 1974

WABASH TRANSFORMER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO THE NATIONAL LABOR RELATIONS BOARD BRIEF IN OPPOSITION

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Every argument advanced by the National Labor Relations Board as a reason for not granting a writ of certiorari in the instant case is erroneous and misleading. In fact, the arguments are directed to the merits of the case and not to the question of whether a writ should be granted.

1. The Board's argument based on *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973) is based solely on the fourth footnote from this Court's Opinion in that decision. However, the fourth footnote does not form a part of the holding of the Court in *Savair*, since it merely contains a description of the argu-

ments made by the Board in that case, which were rejected by the Court. In effect, what the Board is doing is citing to their brief which was unsuccessful in a prior case and arguing that it is the Court's reasoning therein.

2. The Board's argument that the Board did not hold the agent's statement "*per se* so violative of the Board's standard of neutrality" is an accurate quotation from the Board's decision, but the decision itself misrepresents the holding of the Board when viewed in the light of the adjudicative techniques employed during the course of litigation before the Board. Since the Board failed to conduct a hearing prior to issuing its decision, the decision must be construed as holding that the agent's statement was not violative of the Board's standard of neutrality and that no amount of evidence which might have been produced at a hearing could render it objectionable. In sum, the procedures followed by the Board in this case are the administrative analogy to a grant of summary judgment by a federal district court.

3. The Board's reliance on *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324 (1946) is misplaced. The discretion of the Board in *A. J. Tower Co.* is not plenary; on the contrary, discretion in election matters is conditional, limited to the purpose for which the discretion is exercised, i.e. "establishing the procedures and safe guards necessary *to ensure a fair and free choice* of bargaining representatives by employees." 329 U.S. at 330, [emphasis supplied.] Thus, while *A. J. Tower* is controlling in a case where the Board has endorsed an election procedure, it is not relevant in a case such as this where the Board has criticized the agent's conduct, but nevertheless failed to overturn an election. Since it is obvious that the Board in its decision was not establishing procedures for elections, reliance on *A. J. Tower* is erroneous.

4. The argument that the statement was not repeated at the beginning of the second polling period is incredible. First, it implicitedly admits that the statement made prior to the first polling period was objectionable. Secondly, the Board in its conduct of elections is charged with the responsibility to remain impartial throughout the entire conduct of an election, and the fact that an agent did not breach this obligation twice, does not excuse the fact that she breached it once.

5. The argument that the record contains no evidence of an objection by the Employer's manager of manufacturing at the time the statement was made is an unfair construction of the record and is factually erroneous. Because the Board failed to conduct a hearing, there is no fully developed record in this case. What the Board has referred to as a record is merely a series of administrative decisions, written by the Board itself, which contain only the facts the Board chose to include. There has never been an opportunity to establish the fact that the Employer did object to the statement. An objection was made *immediately* by the Employer's counsel who was present at the time of the announcement and yet nothing was done to cure its impact. While the Employer acknowledges that the presentation of this matter at this stage in the proceedings concededly amounts to the injection of evidentiary matters during the appellate process, it is believed justified due to the Board's reliance on the absence of record matters—an absence which exists only because the Board refused to open the record.

Finally, the Board's argument ignores the fact that, by the Board's own regulations, any party to an election is allowed five days to file objections and is under no burden to register them immediately. Rules and Regulations of the National Labor Relations Board, Series 8, as amended. 29 CFR §102.69.

6. The Board's contention that there is no conflict between the decision here and prevailing law in the First and Fifth Circuits is transparently weak. The Board's argument ignores the standard of complete and absolute neutrality required by the First and Fifth Circuits of Board agents in the conduct of elections.

Respectfully submitted,

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